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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1856

LARRY PONCIANO, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT.

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QUESTIONS PRESENTED.

1. Does enforcement by respondent labor organization and employers of their collective bargaining contract involve state action by California, whose statutes and decisional law in general have authorized, approved, and encouraged the

institution of the "union shop"?

2. Is an agreement requiring membership "following seven (7) continual calendar days of employment" in itself violative of any right of association or right to work protected by the United States Constitution?

STATEMENT OF THE CASE.

Petitioners do not allege that the contract in question requires "compulsory full union membership as a condition of employment."

Petitioners do not allege that they have been denied employment because they have been refused membership in respondent union after making request therefor.

I

PETITIONERS DO NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE THE REQUISITE STATE ACTION.

A fair reading of the Court of Appeals' decision reveals that Court in no sense applies a test of "compulsion of state law." *Shelley v. Kraemer*,

334 U.S. 1 (1947), established a state action standard—significant, unambiguous involvement in a particular transaction—from which the Court has never retreated. Rather than showing some immediate and direct effect of state activity, petitioners show only the probabilities of how some court in California might some day deal with the collective bargaining agreement in question.

This Court recently held in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), that state activity much more direct and substantial than the involvement in the present case was insufficient to state a claim under the Constitution; even a state's detailed regulation and licensing with quotas imposed does not represent state action where the preceise rules or conditions limiting conduct are voluntarily agreed upon by the private parties engaged in private affairs.

It is indisputable that California in its statutes and case law has maintained

a strict policy of neutrality towards collective bargaining matters and has simply attempted "to balance the industrial equation, so far as it is possible to do so, by placing employer and employee on an equal basis," *Shafer v. Registered Pharmacists Union Local 1172*, 16 Cal. 2d 379 (1940). Section 923 of the California Labor Code, set out at page 26, of the Petitioners' Appendix, states that governmental authority "has permitted and encouraged employers to organize in the corporate and other forms of capital control," and so therefore it "is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."

Thus, the California Court of Appeal, Fifth Appellate District concluded in an earlier suit involving identical issues, that sufficient state action was not present to invoke federal constitutional protections:

In our view, however, the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action either to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions.

> Such passivity falls far short of the state action required to bring the federal constitutional protections into operation. *Gabaldon, et al. v. United Farm Workers Organizing Committee*, 35 Cal. App. 3d 757 at 765, 111 Cal. Rptr. 203 at 207; Hearing Denied January 31, 1974; cert. den., 416 U.S. 957, 94 S. Ct. 1972. (emphasis added).

The language from *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225 (1956), quoted by Petitioners at page 9 of their brief, is the explanation by this Court of its agreement with a statement of the Nebraska high court. As quoted by Petitioners, this Court said:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements * * *. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 231, 232.

In its opinion the Nebraska Supreme Court had referred to the 17 states which at the time of Congress' action had right-to-work provisions. Thus, the action of Congress in *Hanson* had cut across state law already in effect, permitting contracts that otherwise would be outlawed by the states' statutes.

There is no analogy between California Supreme Court action and the *Hanson* facts. In the California cases cited in support of Petitioners' contention, the California Court merely shielded agreements from nullification by local laws enacted subsequent to formalization by the legislature of the state's traditional hands-off policy.

II

PETITIONERS DO NOT ALLEGE FACTS WHICH CONSTITUTE A VIOLATION OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION.

The *Hanson* case, *supra*, demonstrates that constitutional issues do not arise alone out of the terms of contracts or out of union constitutions. See *Hanson* at footnotes 7, 8, and 9 and the text they amplify. Here, as in *Hanson*, Petitioners protest against what is comparable to the requirement in some states that a lawyer become a member of an integrated bar. 351 U.S. at 238.

Moreover, in finding that Congress' choice of the union shop as a stabilizing force was proper, this Court in *Hanson* noted that the right to work must be looked at in terms of "long-range interests of workers." 351 U.S. at 234.

> "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work . . . To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work. . . ."
> *Hanson, supra*, 351 U.S. at 235.

III

THE ISSUES RAISED HAVE ALREADY BEEN FINALLY ADJUDICATED.

The case at bar is one of three virtually identical lawsuits commenced against virtually the same defendants, regarding the same collective bargaining agreement, seeking the same relief, and raising the identical legal issues. The only difference is that the three suits were brought in behalf of different sets of plaintiffs. Two of these three lawsuits have already been before this Court. In both cases, certiorari was denied. *Delores Mendoza et al. v. United Farm Workers Organizing Committee et al.*, 487 F.2d 311, cert. den. 415 U.S. 918 (1974); *Gabaldon et al. v. United Farm Workers Organizing Committee*, *supra* at page 6.

The third case, currently before this Court, was summarily dismissed by both the Court of Appeal of the State of California for the Fifth Appellate District and the Supreme Court of California. As the Fifth District so succinctly stated,

the instant case simply attempts to rehash issues which have already been resolved.

> In what we thought to be a definitive opinion, the court decided the *Gabaldon* case in favor of the defendant union and growers on the ground that ". . . state action was not involved in the making or implementation of the collective bargaining contract between the union and the growers [and] plaintiffs cannot invoke the protection of the federal Constitution. . . ." (35 Cal. App. 3d at 768.)
>
> Plaintiffs have presented no new authorities or issues.[1] They merely re-present and reargue the same issues and authorities that were thoroughly briefed and discussed in *Gabaldon*, and we consider that case and the authorities therein dispositive. Petitioners' Appendix A at page 1.

It is basic judicial logic and philosophy that the Court's time is precious. The instant issues have already cost many hours of judicial time in this Court as well as in the courts below. To continue this matter when Court calendars are years behind with matters of great personal and constitutional impact would be frivolous.

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[1]It is true that in *Gabaldon* we expressed doubt "that plaintiffs have sufficiently alleged action under color of state law . . ." (*Gabaldon v. United Farm Workers Organizing Committee*, *supra*, 35 Cal. App. 3d at page 762, fn. 4) and that in the case at bench plaintiffs alleged what they considered to be state action. However, we did not decide the *Gabaldon* case on the ground of inadequate allegations of state action but assumed those allegations to be present. The inclusion therefore of the allegations of state action in the instant complaint, which we assumed to be present in the *Gabaldon* action, does not change the result herein.

CONCLUSION.

For all these reasons this Court should not issue a writ of certiorari.

July 19, 1976.

Respectfully submitted,

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